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IN THE

Supreme Court of the United States

No. 329

COMMONWEALTH OF PENNSYLVANIA

v.

EDWARD NOVAK,

Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

WALTER STEIN,
MERVYN R. TURK,
Attorneys for Petitioner.

Of Counsel:
BERGER, STEIN AND KLINE,
1220 P.S.F.S. Bldg.,
12 S. 12th Street,
Philadelphia 7, Pa.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States.

No.

COMMONWEALTH OF PENNSYLVANIA

v.

EDWARD NOVAK,

Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

Edward Novak, by his counsel, Walter Stein and Mervyn R. Turk, Esquires, prays that a Writ of Certiorari issue to review the decree of the Supreme Court of Pennsylvania affirming the judgment and sentence of the Court of Oyer and Terminer and General Jail Delivery of Delaware County, Pennsylvania.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania affirming the judgment and sentence of the Court of Oyer and Terminer of Delaware County, is reported at 395 Pa. 199; 150 A. 2d 102. The opinion of the Court of Oyer and Terminer of Delaware County is reported in 45 Del. 45.

JURISDICTION.

The decree of the Supreme Court of Pennsylvania was entered on March 16, 1959. A petition for reargument was filed with the Supreme Court of Pennsylvania on March 24, 1959, and was denied on April 27, 1959, in a Per Curiam Opinion. The time for filing a petition for Certiorari was extended to August 26, 1959, by order of the Supreme Court of the United States. The jurisdiction of this court

is invoked under Section 1257(3) of Title 28 U. S. C., 28 U. S. C. A., Sec. 1257(3), and the 6th and 14th Amendments of the United States Constitution.

QUESTIONS PRESENTED.

1. Has due process, as provided by the Constitution of the United States, been observed where a defendant in a capital case, now under sentence of death, has been denied the right to discharge his counsel although applications have been timely and repeatedly made? Is such denial justified by the Court's proviso that the defendant may discharge counsel, provided only he, the defendant himself, engage other counsel?

2. Has due process been observed where a defendant was examined and questioned by a State appointed sanity commission in absence of counsel and where defendant had not waived his right to representation?

3. Has due process, as provided by the Constitution of the United States, been observed where a court, in order to determine a man's sanity, applied the M'Naghten rule particularly in the determination whether the man is fit to stand trial?

STATUTES INVOLVED.

The pertinent Sections of the Mental Health Act of 1951 (Pa. Act of June 12, 1951, P. L. 533, Art. I, Sec. 101, etc.; 50 Purdon Statutes, Sec. 1071, etc.:

50 P. S., Sec. 1072 (11):

"As used in this act, unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

"(11) 'Mental illness' shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct

of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed."

50 P. S., Sec. 1225 (a):

"Within ten days of the receipt of an application for commitment, the clerk of court shall cause to be served written notice of the filing of the application on the prisoner's counsel, if he has any, and on his nearest available friend, and shall endorse on the application the names of those notified. Thereupon, the court shall order an examination of the person sought to be committed by two qualified physicians or a commission. Notice of the time and place of the psychiatric examination shall be given to the persons whose names are endorsed on the application by the clerk of court as aforesaid."

50 P. S., Sec. 1225 (b):

"If the court is satisfied that the person sought to be committed is mentally ill or mentally defective, notice of the fact shall be given to counsel, if he has any, and to his nearest available relative, or, in the absence of such, his nearest available friend, who shall be given opportunity to be heard."

50 P. S., Sec. 1225 (c):

"If no hearing is requested by those notified as aforesaid, the court may nevertheless hold a hearing, summon other witnesses, and secure further evidence subsequent to receipt of the report to such examination."

STATEMENT OF THE CASE.

On February 4, 1955, the defendant, Edward Novak, shot and killed Helen K. Jones, his fiance, and her mother Katherine in her home the three were occupying. The defendant waited for the police and submitted to arrest. He admitted the killings. The defense was that of insanity and in addition, counsel has always contended that the defendant lacked the mental capacity requisite to standing trial.

The two bills, on which the defendant was indicted, were brought to trial simultaneously on January 7, 1957. The trial concluded on January 16, 1957, with a jury verdict of murder in the first degree, fixing the penalty at death.

Motions in arrest of judgment and for a new trial were filed on January 18, 1957, and heard by the Court of Oyer and Terminer for Delaware County on June 10, 1957, and denied by the court on November 8, 1957. Two sentences of death were imposed on November 15, 1957.

On December 17, 1957, an appeal was taken to the Supreme Court of Pennsylvania. This appeal was argued on November 20, 1958, and on March 16, 1959, the judgment of sentence of court below was affirmed. On March 24, 1959, a petition for reargument was filed and denied on April 27, 1959. On July 28, 1959, your Honorable Court extended the time for filing the Petition for Certiorari to August 26, 1959.

On February 18, 1955, the Delaware County Court appointed Mervyn R. Turk, Esquire, counsel for the defendant. This appointment, in effect, was withdrawn when it appeared that the defendant was not then indigent. The defendant retained Mr. Turk together with David Berger, Esquire, of the Philadelphia County Bar. On April 9, 1956, Mr. Berger was appointed City Solicitor for the City of Philadelphia. At that time Walter Stein, Esquire, of the Philadelphia Bar, joined Messrs. Turk and Berger as counsel for the defendant. Due to the demands of his public office, Mr. Berger has virtually not practiced

privately from that date and took no active part in the instant matter since April of 1956. About April, 1955, and more than a year and a half preceding the trial, the defendant became dissatisfied with counsel (R. 138a). This fact was made known to the District Attorney in a letter on April 19, 1955, (R. 138a) and to the Court in the report of its own sanity commission (Supp. R. 251) on May 22, 1955, and again in defense counsel's exceptions to the sanity commission's report filed with the Court on that day (Supp. R. 270). This dissatisfaction turned to hostility soon thereafter (R. 163a).

The Delaware County Court took no action. Defendant's counsel, who at all times maintained—and still do maintain—that the defendant is insane, took no formal action, of course, until it was judicially determined by the verdict that on the record the defendant was "sane".

Immediately preceding the trial, on January 7, 1957, the defendant most vigorously renewed his professed dissatisfaction for his counsel and his hostility toward them and asked the Court to dismiss them (R. 139a). This the Court refused to do.

On the third trial day, January 9, 1957, the defendant erupted into violence, attacking the court clerk with a razor. Again the defendant denounced counsel and demanded that they no longer represent him (R. 139a). The following day counsel made an application to be relieved of their representation. This the Court refused but noted on the record the fact that the defendant refused to and would not cooperate with his counsel (R. 139a).

Upon conclusion of the trial, counsel again made an application to be relieved of representation, at which time the Court suggested that such application be deferred until the motion for new trial had been argued, because of counsel's thorough acquaintance with the voluminous record (R. 139a and 140a).

On June 20, 1957, counsel argued the motions as ordered and on July 24, 1957, they filed a formal Petition

for Leave to Withdraw (R. 142a and 143a). This motion was heard by the entire bench of the Delaware County Court on that same day and refused (R. 140a).

On June 24, 1958, about five months prior to the date of argument of the appeal, counsel petitioned to the Supreme Court of Pennsylvania for release of representation. The petition was refused on July 1, 1958, with one justice dissenting.

Counsel continued their representation of the defendant in the preparation for and throughout the trial, post trial motions, and the appeal without the benefit of any communication with their client and against his expressed wishes and in spite of his dissatisfaction and hostility. All of this has at all times been known to the County Court and from June, 1958, to the Supreme Court of Pennsylvania.

On May 6, 1955, defendant's counsel filed a petition for defendant's commitment to a hospital for mental illnesses pursuant to the Mental Health Act of Pennsylvania (Mental Health Act of June 12, 1951, P. L. 533, 50 P. S. §1071 et seq.). A commission appointed by the Court concluded that the defendant showed a profound personality disorder that had led to all types of aggression and antisocial behavior, but that he was not mentally ill, and moreover that he was not insane but could distinguish right from wrong. The commission further found that the defendant was able to comprehend his position with relation to the crimes of which he stood accused, to confer with his counsel in an intelligent manner, to prepare his defense if he so desired, and to make a rational defense to the crimes of which he stood accused (Supp. R. 251/2).

This finding was appealed to the Supreme Court of Pennsylvania because of the technique applied. The Supreme Court quashed the appeal on the ground that it was premature, 384 Pa. 237, 120 A. 2d 543. Certiorari was denied. 352 U. S. 25, 77 S. Ct. 35, L. ed. 2d 48.

Among the complaints was the fact that the Commission examined the defendant in the absence of his counsel. It was the commission's desire to examine the defendant without the presence of counsel and in the absence of defendant counsel acceded (Supp. R. 182, 185). However, defendant was never informed of his rights. The commission was aware of the lack of communication between defendant and his counsel (Supp. R. 183 and 186) and the absence of rapport between them was obvious (Supp. R. 187). Counsel, at the time, specifically stated he was not waiving any of defendant's rights (Supp. R. 184).

The procedure before the sanity commission is without doubt an essential step in the criminal proceedings. This becomes entirely clear from the action of the Supreme Court of Pennsylvania in quashing the appeal from the determination of the sanity commission.

The ability of defendant to stand trial was again raised at the time of the trial by counsel, together with the question of his sanity at the time of the commission of the offences. Over counsel's protests, all these questions were submitted by the Court below to the jury at the same time and subject to the test of the rule of M'Naghten's Case.

The violation of defendant's constitutional rights on the question of representation was specifically raised at the trial level (R. 121a) and again in the petition originally filed in the Supreme Court of Pennsylvania (R. 140a-141a) as well as on the appeal (R. 162). Counsel's motions and requests were overruled by the Supreme Court of Pennsylvania (R. 162) and by the Delaware County Court (R. 121a-123a).

The defendant's constitutional rights at the sanity hearing were specifically and promptly protected (Supp. R. 184) and the application of the rule in M'Naghten's Case was protested on constitutional grounds at the trial (R. 114a) and argued on appeal to the Supreme Court of Pennsylvania (R. 160). The Supreme Court of Pennsylvania and the lower court held the absence of counsel

not to be a violation of the defendant's constitutional rights (R. 157) and by the Delaware County Court (Supp. R. 282). The objection to the rule in M'Naghten's Case was overruled by the county court (R. 130a) and by the Supreme Court of Pennsylvania (R. 160).

REASONS FOR GRANTING THE WRIT.

1. It is an important constitutional question to have decided whether a man may suffer the death penalty after having been perforce represented by counsel to whom he is hostile, particularly where he has made known his dissatisfaction to the court long before trial. It is likewise important to determine whether or not the defendant's constitutional rights have been preserved or guarded where a court gives a defendant the right to discharge his lawyer only on condition that he himself procure other counsel, overlooking entirely defendant's right to represent himself.

It is further an important constitutional question whether or not due process has been observed where the court failed to make certain that the defendant has been apprised of his constitutional rights with respect to representation, particularly where the court should know that the defendant has no communication with his own counsel.

A defendant is entitled to be represented throughout all the proceedings, either in person or by counsel. *Chessman v. Teets*, 354 U. S. 156, 162; 1 L. ed. 2d, 1253, 1258; 77 S. Ct. 1127. The fourteenth Amendment's guarantee of due process includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to "fair opportunity to secure counsel of his choice". *Crooker v. California*, 357 U. S. 433, 439; 2 L. ed. 2d 1448, 1454; 78 S. Ct. 1287. This constitutional right, however, does not justify forcing counsel upon an accused who wants none. *Moore v. Michigan*, 355 U. S. 155, 161; 2 L. ed. 2d 167, 172; 78 S. Ct. 191.

A court cannot find a defendant "sane" on the one hand and on the other hand refuse to hear him and consider what he has to say on the question of being represented in a homicide case.

2. The decision of the Supreme Court of Pennsylvania is in direct conflict with part of the decision of the Circuit Court of Appeals for the District of Columbia in *Lee v. U.S.*, 235 F. 2d 219 (particularly fn. 5).

In the *Lee* case, defendant's counsel whom he had hired was permitted to withdraw. The substitute counsel was likewise permitted to withdraw and the Court reappointed original counsel although it was informed that the defendant did not want him and, as a matter of fact, was threatening to denounce counsel to the Grievance Committee. The court stated (p. 221):

> "Should the court ultimately be obliged to appoint counsel, we assume that, however ill-founded appellant's objection, Mr. Koonin will not be reappointed."

and in the footnote the court says (p. 221, fn. 5):

> "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously." In re Mandell, 2 Cir., 1934, 69 F. 2d 830, 831.

3. It is important to determine whether there has been a violation of the defendant's constitutional right where he was examined under the Mental Health Act in the absence of his counsel, particularly where the act specifically provides for counsel's right to be heard (50 P. S., 1225 (b)). The right to counsel is not a right confined to representation during the trial on the merits. *Reece v. Georgia*, 350 U. S. 100; 1 L. ed. 77; 76 S. Ct. 167; *Moore v. Michigan*, *supra*.

Although counsel in the absence of defendant stated to the commission that he was perfectly satisfied to absent

himself if the commission so desired, it is equally true that defendant was uninformed of his rights and never waived them. In fact, at the time counsel stated specifically that he was not waiving any of defendant's constitutional rights (Supp. R. 184).

Defendant in a criminal procedure, particularly in a capital case, is entitled to be represented by counsel at every stage of the proceedings, *Chessman v. Teets, supra*. It is quite clear that the right to be represented can be waived only by the defendant himself.

Such a waiver must be an informed and intelligent one. *Moore v. Michigan, supra.* It follows that counsel, without expressed permission from defendant, cannot be excluded from any proceedings.

Paradoxically, while insisting on defendant being represented, the State court finds no violation in defendant being examined by a sanity commission in the absence of counsel.

4. It is important to determine whether due process has been observed where a commission in determining a defendant's fitness to stand trial for two murders ignores the provisions of the applicable statute, conducts the hearing without the benefit of counsel, refuses to delve into fundamental sources of information and actually refuses to consider material information offered it (Supp. R. 269).

The test as laid down in the rule of M'Naghten's Case is improper to determine a man's sanity at the time of the commission of the crime. It is infinitely worse to apply that rule in order to determine whether a man is fit to stand trial.

We submit the violation of due process becomes all the more evident when it is considered that the commission stated that the defendant had a profound personality disorder but was not mentally ill (Supp. R. 251).

5. An increasing number of jurisdictions have recognized that the rule of M'Naghten's Case is antiquated and

completely unrealistic in the light of modern science to determine whether a man was "sane" at the time of the commission of the offence. The leading case is *Durham v. U. S.*, 214 F. 2d 862.

A man is not held responsible for a crime where at the time of the commission he was "insane". It has always been a troublesome matter to determine a man's insanity as of that particular time. We submit, it is a violation of due process to apply a test which is now known to be inadequate and inconclusive in the light of present science.

CONCLUSION.

The instant petition raises serious and heretofore unresolved constitutional questions. Here a defendant, pronounced "insane" by three prominent psychiatrists, faces death because of what we contend was a gross disregard of his constitutional rights.

It is respectfully submitted that the instant petition for a Writ of Certiorari be granted.

EDWARD NOVAK,
Petitioner.

By His Counsel:

WALTER STEIN,
MERVYN R. TURK.

Of Counsel:

BERGER, STEIN AND KLINE.

APPENDIX.

OPINIONS AND ORDER OF THE SUPREME COURT OF PENNSYLVANIA.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 33. January Term, 1956.

Commonwealth of Pennsylvania

v.

Edward Novak,

Appellant

APPEAL FROM ORDER OF THE COURT OF OYER AND TERMINER OF DELAWARE COUNTY AT No. 340 ETC. OF MARCH TERM, 1955.

OPINION OF THE COURT.

Jones, *J.* Filed: February 6, 1956

This appeal is from an order of the Court of Oyer and Terminer of Delaware County dismissing defendant's exceptions to the court's order accepting and approving the report of a sanity commission and refusing to commit the defendant to a hospital for the mentally ill.

The defendant was charged on March 9, 1955, with murder in indictments returned by the Delaware County

grand jury. On May 6th, while he was confined in jail awaiting trial, his counsel petitioned the court under the provisions of the Mental Health Act of June 12, 1951, P. L. 533, as amended, 50 PS § 1071, et seq., for the defendant's commitment to a mental hospital. On the same day, the court entered an order appointing a commission consisting of two qualified physicians and an attorney to investigate the defendant's condition and to report therein to the court.

Following a psychiatric and neurologic examination of the defendant, the commission on May 27, 1955, filed with the court its report wherein it found that the defendant was not mentally defective; that there was no evidence of organic disease of his nervous system; that, although he showed a marked personality disorder leading to all kinds of aggressive and anti-social behavior, he is not mentally ill; that he is not insane; that he was able to comprehend his position with relation to the crimes for which he stands indicted, to confer with his counsel in an intelligent manner, to prepare his defense if he so desires and to make a rational defense.

After consideration of the commission's report and the evidence whereon it was based, the court entered its above-mentioned order of May 27th which, in part, contained the following: "* * * said defendant Edward Novak is not in such condition as to make it necessary that he be cared for in a hospital for mental illness and this Court does therefore refuse to commit said defendant, Edward Novak, as requested in the prayer of the petition heretofore filed." Exceptions to this order and the commission's report were dismissed by the court en banc. This appeal by the defendant followed.

The Commonwealth has filed a motion to quash on the ground that the appeal is from an interlocutory order. That the order is interlocutory no one denies. Appellant's counsel concede that it is interlocutory but contend that, in the circumstances, it is appealable nonetheless.

As a general rule, an appeal will not lie in a criminal proceeding until judgment of sentence has been passed. It

has been said, however, that this rule is not one of unyielding inflexibility. Where the interlocutory order, for all practical purposes, presents a somewhat final aspect, an appellate court will review it in order to safeguard basic human rights or to prevent a great injustice to a defendant. In *Commonwealth v. Trunk*, 311 Pa. 555, 565, 167 A. 333, it was said that "While it may be true generally that appeals may not be taken in criminal proceedings where judgment of sentence has not been passed, this rule should not be held one of universal application. There are instances where great injustice would thereby be done to defendants." In that case the trial court suspended sentence on bills upon which it did not act. We allowed an appeal and held that the action of the court below constituted an abuse of judicial discretion. In *Commonwealth v. Patch*, 98 Pa. Superior Ct. 464, a suspension of sentence after conviction was likewise held to be appealable. In *Commonwealth v. Ragone*, 317 Pa. 113, 126, 176 A. 454, the Commonwealth asserted that the defendant's appeal was premature because there was no entry of judgment on the verdict in the court below. In that case the defendant's trial for murder was abortive from the beginning, the defendant being admittedly insane. Nevertheless, the case was permitted to go to the jury which returned a verdict of guilty. In entertaining the appeal to this court, Mr. Justice Maxey said "It is true that the rule is that 'there must be a final judgment or something in the nature of a final judgment before it is ripe for review in this court': Com. v. Ruth, 104 Pa. 294, 297. But this rule has, in exceptional cases and to safeguard basic human rights, been construed as not being one of unyielding inflexibility."

The appellant's current situation does not present a case of an appealable interlocutory order. He is not in danger of losing any right with respect to a conclusive determination of his mental health. He has not yet been brought to trial. If, upon trial, the jury should find him guilty of the crime charged, he can thereafter petition for

a sanity commission to examine into his mental condition, and an order ultimately entered in such proceeding would be appealable: see *Commonwealth v. Patskin*, 375 Pa. 368, 100 A. 2d 472, and *Commonwealth v. Moon*, 383 Pa. 18, 117 A. 2d 96.

In *Commonwealth v. Patskin*, supra, the petition for a commission to examine into and report on the defendant's mental condition was not filed until after he had been convicted of murder in the first degree and sentenced to death in accordance with the jury's verdict. The Court, disapproving the commission's report that the defendant was mentally ill and a proper subject for commitment to a hospital, concluded that he was sane and not suffering mental illness. Thereupon the court vacated an extant stay of execution which operated as a dismissal of the petition for commitment. With execution thus facing the defendant, the order rejecting the petition was, of course, appealable under the rulings in the *Trunk* and *Ragone* cases, supra. Likewise, in *Commonwealth v. Moon*, supra, the defendant was tried and convicted of murder in the first degree with sentence fixed by the jury at death. After verdict but before sentence had been imposed, a petition for the appointment of a commission to examine into the defendant's mental health was filed and a commission was duly appointed. After hearings, the commission reported to the court that the defendant was in fact mentally ill, that the illness was chronic and continuing, and that the defendant was a proper subject for commitment to a mental hospital. The court reviewed the sanity commission's report and the evidence whereon it was based and, concluding that the defendant was legally sane, entered an order directing that the criminal proceedings continue; a motion of the defendant for a new trial was then pending. Here, also, the court's order was appealable because of its relative finality in the circumstances.

In *Commonwealth v. Bechtel*, p. ante (handed down this day), the defendant, indicted for murder, had

not yet been brought to trial. Nevertheless, we entertained his appeal from the trial court's approval and adoption of the report of a sanity commission finding him mentally ill and a person of criminal tendency. The commission recommended that the defendant be committed to Farview State Hospital, and the court accordingly entered an order to that effect. The reason the order was appealable is obvious. It was final unless and until the court at some time in the future might possibly find that the defendant has been restored to mental health and rescinds the order of commitment. Furthermore, the appeal was not for the purpose of questioning the finding that the defendant was mentally ill and a proper subject for immediate hospitalization but to complain of the character of the institution to which he was committed. Unless that question could be at once reviewed on appeal, it would necessarily become moot since the defendant would continue to remain in the institution to which he objected. The *Bechtel* case is plainly distinguishable from the present. In the former the defendant was committed for what might prove to be the balance of his life while in the present case the defendant was found not to be mentally ill and is left entirely free to litigate his mental condition further if, upon trial for the crime charged, he is found guilty.

Appeal quashed.

Mr. Justice Musmanno dissents.

ORDER ON PETITION FOR REARGUMENT.

"Order

March 6, 1956, the within petition is denied.

Per Curiam."

IN THE SUPREME COURT OF PENNSYLVANIA.
EASTERN DISTRICT.

Nos. 166, 182, January Term, 1958.

COMMONWEALTH

v.

EDWARD NOVAK,
Appellant.

APPEALS FROM THE JUDGMENT AND SENTENCE OF THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY IN AND FOR THE COUNTY OF DELAWARE AT NOS. 340 AND 341 MARCH SESSIONS, 1955.

OPINION OF THE COURT

BELL, *J.* Filed: March 16, 1959.

A jury found defendant guilty of murder of the first degree and fixed the penalty at death in his trial for the murder of Katherine Jones, and also found him guilty of murder of the first degree and fixed the penalty at death in his trial for the murder of Ella K. Jones, Katherine's daughter. Defendant filed a motion in arrest of judgment and a motion for a new trial which were dismissed by the lower Court. The lower Court thereupon sentenced him to death. From the judgment and sentence defendant took this appeal.

Because this is a capital case we shall discuss every one of defendant's contentions which may have any possible merit.

The first question presented was whether the Commonwealth made out a prima facie case, and if so whether the verdict was against the weight of the evidence.

Defendant and Ella Jones were engaged to be married. They, with her mother, were living at 500 Fern Street, Darby. There was considerable friction in the home for a month. According to defendant, Ella and her mother kept reminding him that he was on probation and that they could have him arrested at any time. He became incensed when Ella and her mother allowed a coffee pot to burn; he became incensed when Ella's mother insisted on bringing old furniture into the house; and when she sold some tools, although they were her property. Because of their almost constant arguments, defendant demanded that Ella convey her interest in the property to him, which she did on February 1, 1955. On the evening of that day, Ella had defendant arrested on charges of drunk and disorderly conduct, threatening to kill and breach of the peace. At the hearing before the Justice of the Peace, Ella testified that defendant had kicked her on the leg and had threatened her several times with a gun which he had in the house. After they returned home, they continued to argue during the next two days.

On the morning of February 4, 1955, defendant and Ella again became involved in an argument over his recent arrest. Ella refused a reconciliation. When she started to leave the house to go to work, defendant ran to a closet in the living room, got his revolver and fired seven bullets into her head and body. Many of the shots were fired with the muzzle of the gun within 24 inches of the victim's body, and one at the distance of 18 inches. Since the cylinder of the revolver held but five cartridges, the jury could well have found that the defendant must have paused to reload his gun. Ella's death was caused by one or more of these bullets. Defendant then went to the rear of the house and shot Ella's mother as she was standing on the

landing just outside the kitchen door calling for help. He fired two bullets into Mrs. Jones. Her death was caused by one or both of these bullets. The murder of Mrs. Jones was witnessed by Mrs. Grace Wood, a neighbor who was walking past the house at the time; there were no eye witnesses to the shooting of Ella Jones.

Officers arrived quickly and were met at the front door by the defendant who immediately said "I killed them." Defendant added "I have no gun." The officers then went into the house and found Ella Jones lying on the floor of the living room moaning in pain. Mrs. Katherine Jones was found lying in the snow at the bottom of the steps leading down from the kitchen door. She was apparently dead. The women were rushed to the hospital and were pronounced dead on arrival. Defendant gave detectives several false leads as to what he had done with the gun. It was found after many hours of search secreted in an automatic gas heater in the basement.

There is not a shadow of a doubt as to defendant's guilt. These were two cruel, heartless, savage murders. Defendant wilfully, deliberately and premeditatedly got a gun and shot and killed Ella Jones and her mother after numerous threats and after Ella refused a reconciliation. Defendant alleges that the killings were without the slightest motive and because of that and because he was in a state of intense excitement, the killings could not amount to murder in the first degree. "Evidence to prove motive, intent, plan or design are admissible [citing cases].": *Commonwealth v. Homeyer*, 373 Pa. 150, 159, 94 A. 2d 743. However, "proof of motive is always relevant but never necessary.": *Commonwealth v. Malone*, 354 Pa. 180, 188, 47 A. 2d 445. Moreover, in this case the motivation was obvious, namely, hatred and resentment. Mrs. Freedman, a witness for defendant, whose home defendant had visited on February 2nd, testified that defendant called Ella's mother a foul name, said he "hated her guts" because she

was keeping Ella away from him, and said "I ought to kill her." Defendant testified on the witness stand "There was murder in my heart the day she [Ella] had me arrested [February 1st]." He testified that after his return from the hearing on February 1st he looked for the gun and failed to find it, but added "I would have believed I would have killed the both of them that night there and then."

When defendant was arrested and taken to the police station he was "perfectly calm, he was talking like an ordinary person would talk if you had a conversation with him." When he was asked by one of the arresting officers why he had shot the women, defendant replied "They were robbing me." All the ingredients necessary for first degree murder are so clearly present in this case and the evidence of defendant's guilt is so overwhelming that a citation of authorities to support the conviction is unnecessary.

Defendant contended prior to arraignment and before trial and on this appeal that he lacked the mental capacity requisite to standing trial.

DEFENDANT'S MENTAL CAPACITY TO STAND TRIAL AND TO MAKE A RATIONAL DEFENSE.

". . . the test at common law and employed by the courts in determining the mental capacity of a defendant to stand trial or to be sentenced or executed is not the M'Naghten 'right or wrong' test but whether the defendant is able to comprehend his position and make a rational defense.": *Commonwealth v. Moon*, 383 Pa. 18, 23, 117 A. 2d 96.

Prior to trial and pursuant to the Mental Health Act of 1951 as amended, the lower Court appointed a Commission to examine defendant. We adopt the following excerpt from that Court's opinion on the question of defendant's ability to stand trial:

"The commission thereupon proceeded to make a psychiatric examination of the defendant, and a neurologic examination was performed independently by the two physicians.' In due course, the commission filed its report with this Court in which it found, inter alia, that Edward Novak is not mentally defective; that there is no evidence of organic disease of the nervous system; that he shows a profound personality disorder that has led to all types of aggression and anti-social behavior, but *he is not mentally ill;** that he is not insane, but can distinguish right from wrong; that he is able to comprehend his position with relation to the crimes of which he stands accused, *to confer with his counsel in an intelligent manner to prepare his defense if he so desires* and to make a rational defense to the crimes of which he stands accused."

The lower Court then held that defendant was not mentally ill within the purview of the Mental Health Act:

"After a thorough study of the commission's report and the evidence upon which it was based, and in the exercise of our own independent judgment (Commonwealth v. Patskin, 375 Pa. 368, 375), . . ."

. . .

"We have read and re-read the commission's report and the evidence upon which it was based. It is our considered opinion, after mature and deliberate study, that the commission discharged the duties of its appointment with ability, fidelity and complete impartiality. The report gives every evidence of thorough, painstaking consideration and preparation. We find no inconsistency or contradiction in the commission's findings and conclusions. And such findings and conclusions, in our opinion, find abundant support in the evidence.

"The commission's estimate of defendant's general attitude throughout the examination, accords with our own impression after repeated readings of the evidence. After

* Italics throughout, ours.

remarking that defendant showed during the examination, evidences of marked hostility and aggression towards others, the commission said: 'However, during the course of our examination he was polite and co-operative. When he dealt with matters irrelevant to the questioning he agreed to drop such discussion and return to the topic at hand. A half dozen times during the interview he went into violent rages screaming, crying, beating his fist on the table, yet, when he was ordered to desist and return to the orderly questioning, he did so and was relevant once more.'

. . .

"We were not, of course, bound by the findings and conclusions of the commission. As the Supreme Court said in Commonwealth v. Patskin, 375 Pa. 368, 375, 'If a commission is appointed its findings are advisory and not mandatory upon the court—under the Act it is the Court and not the psychiatrist or the Sanity Commission which must be satisfied that the petitioner is insane or mentally ill.' We were of opinion that defendant was not mentally ill. On occasions when we had opportunity to observe him, there was nothing in his bearing, appearance, or demeanor suggestive of mental illness."

Defendant also contends that his statutory and Constitutional rights were violated because his counsel was not present when he was examined by the Commission and therefore could not cross-examine. Neither counsel for defendant nor counsel for the Commonwealth were present at the psychiatric examination of defendant. Indeed, defendant's counsel said they were satisfied not to be present. In *Commonwealth v. Iacobino*, 319 Pa. 65, 178 A. 823, the Court said (page 69): "A defendant charged with a crime who invokes a statutory or common-law remedy to determine his sanity before trial or after conviction has no constitutional right to be confronted by or cross examine witnesses or the members of the commission appointed to ascertain that fact. Such inquiries are for the determina-

tion of a fact apart, separate and distinct from that of guilt of the crime itself, as to which trial or sentence may or may not be ordered. The appointment is not demandable of right and if it is contended the members appointed are biased or otherwise incompetent, objection, with the reasons therefor, should be made to the court at the time of appointment. The court may then determine whether it has made a mistake in the selection of persons to inform its conscience. Where witnesses are produced, and they may be by either side, it is customary for counsel to appear and examine or cross examine them if necessary. The matter is entirely in the control of the court appointing these officers, who in the interest of justice will see that the accused is not prejudiced by the course of the investigation."

INSANITY.

Defendant's sole defense at the trial was that he was insane at the time of the killings. Once again we quote with approval from the able and convincing opinion of the lower Court:

". . . In support of his defense of insanity, and of his contention of inability to stand trial, defendant relied upon the testimony of three psychiatrists, who had examined him within a few months after the killings. The Commonwealth met this issue with the testimony of two psychiatrists, and some lay testimony. It is necessary here to relate something of the defendant's attitude and conduct at the trial, for the bearing it may have on the question of his mental condition.

"Defendant's behavior was perfectly normal and proper during the first two days of the trial. At the opening of court on the third day, however, he erupted into violence. He lunged and thrashed about in the most reckless and disorderly manner, and made an assault upon a court officer, all the while calling out in a loud and boisterous voice, so that it required considerable force to subdue him

and remove him from the courtroom. He engaged in substantially similar conduct on other occasions during the trial. It was necessary at times to keep him under physical restraint in the courtroom, and to take measures to prevent him from continually interrupting the proceedings with his raucuous and belligerent cries.

"There was abundant testimony that on the occasions when defendant was removed from the presence of the jury, following these outbursts, he soon subsided and became very calm, orderly and submissive, except for one or two minor incidents. On defendant's first removal, it was testified, his immediate concern was for his watch, his glasses and some papers he had brought to trial. A witness stated that when he asked defendant why he acted as he did in the courtroom, defendant asked the witness what he would do if he "wanted to get attention." The Commonwealth produced testimony to show that in conversations between defendant and the trial Judge, and between defendant and the President Judge—conversations had at defendant's urgent and repeated solicitations and in the presence of counsel—defendant was never abusive or violent in either language or conduct, but was uniformly courteous, polite and respectful. One witness testified, "He was very calm, asked very intelligent questions, talked very coherently, and his general behavior was that of a normal person." Other witnesses testified that defendant fully comprehended and understood his position. It was also shown that defendant frequently conferred with counsel in the course of the trial, both during the selection of the jury and during the questioning of witnesses. . . .

"The psychiatric testimony on both these issues was extensive, and was in irreconcilable conflict. In addition to the medical testimony, however, the jury had before them the defendant's behavior in court, and the testimony as to his completely changed attitude and conduct when he was out of their presence. The jury may have considered whether or not the defendant was feigning insanity. They

may have questioned whether defendant's pleas of insanity at the time of the killings, and of mental inability to stand trial, were entered in sincerity and good faith, or by way of more stratagem and artful device. Be that as it may, our study and analysis of the record leads us to the conclusion that the preponderating weight of the evidence supports the jury's findings that the defendant was sane at the time of his commission of the homicides, and that he was able to comprehend his position and make a rational defense."

There was ample evidence to support the finding of the jury and of the lower Court that defendant was sane at the time of the homicides and was competent to stand trial and make a rational defense at his trial.

Defendant further contends that he was entitled to have his trial continued and a separate trial allowed him on the question of his sanity. There is absolutely no merit in this contention. No Constitutional or statutory or other rights of defendant were violated. Cf. *Commonwealth v. Iacobino*, 319 Pa., *supra; Commonwealth v. Ragone*, 317 Pa. 113, 123, 176 A. 464; *Commonwealth v. Cilione*, 293 Pa. 208, 216, 142 A. 216; *Commonwealth v. Scovern*, 292 Pa. 26, 29, 140 A. 611; *Webber v. Commonwealth*, 119 Pa. 223, 13 A. 427.

Defendant next contends his Constitutional rights were violated by the application of the rule in *M'Naghten's Case*. Defendant, as other defendants repeatedly have, asks us to reject or change the rule laid down in *M'Naghten's Case*, 8 Eng. Rep. 718, which was adopted as the law of Pennsylvania in *Commonwealth v. Mosler*, 4 Pa. 264. These cases established the so-called "right and wrong" test for insanity, when insanity is raised as a defense by a defendant. Defendant desires us to adopt some undefined psychiatric test. Once more, we refuse to do so. The *M'Naghten Case* rule or "the right and wrong test" has been repeatedly reaffirmed by this Court—as recently as 1955. See *Commonwealth v. Moon*, 383 Pa. 18, 23, 117 A. 2d

96; *Commonwealth v. Patskin*, 375 Pa. 368, 371, 100 A. 2d 472; *Commonwealth v. Heller*, 369 Pa. 457, 461, 87 A. 2d 287; *Commonwealth v. Neill*, 362 Pa. 507, 514, 67 A. 2d 276.

In *Commonwealth v. Patskin, supra*, the Court said (page 371): "The law of Pennsylvania (following M'Naghten's Case, 10 Cl. & Fin. 200 (1843) provides that the test of insanity is whether the defendam at the time of the commission of the killing knew the nature and consequences of his acts, or the difference between right and wrong: Commonwealth v. Heller, 369 Pa., supra."

In *Leland v. State of Oregon*, 343 U. S. 790, 800, 801, the Court said:

"Much we have said applies also to appellant's contion that due process is violated by the Oregon statute providing that a 'morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.' That statute amounts to no more than a legislative adoption of the *'right and wrong' test of legal insanity in preference to the 'irresistible impulse' test.* Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irrestible impulse test is not 'implicit in the concept of ordered liberty.'"

Defendant next contends that it was error to admit into evidence the bloody clothing and photographs of the dead

women, since they were irrelevant and inflammatory. There is no merit in this contention. When a defendant pleads not guilty, they are never irrelevant, although some of the photographs may be inadmissible because too inflammatory. In *Commonwealth v. Ballem*, 386 Pa. 20, 123 A. 2d 728, the Court said (page 26): "Pistols, fruits of the crime, clothing, parts of the body of the person killed, everything pertaining to the crime which will aid the jury in its consideration of the (alleged) crime and the guilt or innocence of the accused, is admissible." This has been the law for centuries. The law is likewise well settled that in the trial of criminal cases photographs of the victim and of the scenes of the crime are admissible to aid the jury in their understanding of the alleged crime, the kind of crime it was, exactly what caused the victim's death and what, if any, connection defendant had with it; however, they are not admissible for the purpose of exciting or inflaming the emotions of the members of the jury. The admission of photographs is largely within the discretion of the trial Court and will not be reversed except for a flagrant abuse of discretion: *Commonwealth v. Patskin*, 375 Pa., supra; *Commonwealth v. Bibalo*, 375 Pa. 257, 100 A. 2d 45; *Commonwealth v. Smith*, 374 Pa. 220, 97 A. 2d 25; *Commonwealth v. Moon*, 389 Pa. supra; *Commonwealth v. Gibbs*, 366 Pa. 182, 76 A. 2d 608; *Commonwealth v. Sydosky*, 305 Pa. 406, 158 A. 154; *Commonwealth v. Simmons*, 361 Pa. 391, 65 A. 2d 353. When gruesome pictures, or pictures tending to inflame the jury's emotions, are admitted in evidence, the trial Judge should explain to the jury their purpose and admonish them not to permit the photographs to inflame their emotions or to prejudice them against the defendant. All the pictures which were admitted by the trial Judge in this case were properly admitted. Furthermore, the trial Judge explained to the jury the purpose for which the photographs were admitted and carefully admonished them against permitting the photographs to prejudice them against defendant.

The final contention made by defendant was that his Constitutional rights were violated because he was deprived of counsel of his own choice.

A defendant has a Constitutional right to choose at his own cost and expense any lawyer he may desire: Constitution of Pennsylvania, Art. I, § 9; Constitution of the United States, Amend. V (due process), Amend. XIV, (due process); *Commonwealth v. Thompson*, 367 Pa. 102, 106, 79 A. 2d 401. In a capital case, if a defendant is not financially able to employ counsel or if for any reason he is unwilling or unable to engage counsel, the Court will appoint, at the expense of the County, a lawyer to represent the defendant: *Commonwealth v. Thompson*, 367 Pa. supra; *Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41, 45, 24 A. 2d 1.

Defendant engaged two capable and experienced lawyers who were familiar with criminal practice and paid them with a very substantial fee. Four months thereafter, defendant became dissatisfied with his counsel. After a while he was not only dissatisfied but actually hostile to his counsel. Counsel then petitioned the Court for leave to withdraw from the case. Defendant and his counsel were told by the Court orally and the Court entered an Order that counsel would be allowed to withdraw as soon as defendant procured other counsel who would enter an appearance for him. At no time either before trial, during trial, or after trial did defendant procure another attorney who was willing to appear for him at the trial or in connection with his indictment. Defendant states that he contacted Francis R. Lord, a member of the Delaware County Bar, for the purpose of retaining him as counsel. "At the bar of the [lower] Court Mr. Lord stated that he had discussed the matter with the defendant but had been unable to come to terms with him and would not represent him." Counsel for defendant then filed a petition with this Court to be relieved as defendant's counsel. This Court denied their petition. When defendant's case was called for trial on January 7, 1957, defendant asked the trial Judge to let

him "fight this with another lawyer". The trial Judge refused this request. On the fourth day of the trial, defendant's counsel made a motion at side bar requesting the trial Judge to relieve them from further representation of defendant, because of his dissatisfaction and lack of confidence in them, and his refusal to co-operate properly with them. This motion was denied.

The trial Judge's rulings were not a denial of defendant's Constitutional rights. Constitutional provisions, like all laws, must receive a sensible and reasonable construction. The accused's right to choose counsel must be exercised at a reasonable time and in a reasonable manner. Defendant had a period of almost two years in which to procure counsel to his liking and in whom he could have confidence. He was never denied the opportunity to exercise this right. Defendant knew when his case would be called for trial. He could not wait until the very day of his trial to choose another counsel. This would be, under the circumstances here present, an unreasonable interpretation of his Constitutional rights and would shackle not promote Justice. The lower Court in its opinion said: "We take the opportunity to state . . . that counsel at all times have discharged the duties of their employment with diligence, fidelity and outstanding ability." We add that counsel for defendant, in their briefs and in their oral argument before this Court, have ably presented every factual argument and every legal argument which could be presented by astute counsel. If a defendant who engages his own counsel refuses for two years to engage other counsel and waits until the trial of his case to demand an opportunity to engage other counsel, he can repeat this strategy every time his case is called for trial, and society would not receive the protection and equal Justice to which both they and the accused are entitled.

We decide that the evidence amply supported the verdict and the death penalty fixed by the jury; that defendant's mental condition did not prevent his making as

good a defense as was possible in the light of the homicides which he committed; that there was ample evidence from which both the jury and the Court below could justifiably conclude that defendant was sane; that defendant had a fair trial; and that he was not deprived of any of his Constitutional rights.

Judgment and Sentence affirmed.

MR. JUSTICE MUSMANNO dissents.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 329.

EDWARD NOVAK,

Appellant,

v.

PENNSYLVANIA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

WALTER STEIN,
MERVYN R. TURK,
Attorneys for Petitioner.

Of Counsel:
BERGER AND STEIN,
1220 P.S.F.S. Bldg.,
12 S. 12th Street,
Philadelphia 7, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 329.

EDWARD NOVAK,

Appellant,

v.

PENNSYLVANIA.

PETITION FOR REHEARING OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

Edward Novak by his counsel, Walter Stein and Mervyn R. Turk, Esquires, prays that the court rehear and reconsider the original petition for a writ of certiorari to the Supreme Court of Pennsylvania, Eastern District heretofore filed. The following matters have intervened or have not been previously presented.

I.

Without knowledge of counsel and while counsel was preparing the petition for a writ of certiorari the defendant filed a petition for a writ of habeas corpus in the court of Quarter Sessions for Delaware County, Pennsylvania, where he was tried. No copy of it was ever presented to counsel. A knowledge of it came by way of hearsay. A copy was obtained and is attached hereto as written in the appendix. We understand, that no action has yet been taken on this petition and the Delaware County Court has informed us that it contemplates to dispose of it without

counsel being present or being heard in accordance with defendant's wishes. We know of no answer having been filed by the Commonwealth. Defendant's petition presents aspects of tremendous importance.

1. For the first time the defendant himself has been permitted to state as a matter of record that he wishes to represent himself. Heretofore, the Pennsylvania Courts have permitted him only to speak through counsel. It is true that counsel never urged the court to let the defendant represent himself. Of course, counsel was unable to do so because the defendant—as was entirely clear to the Pennsylvania Courts—refused to communicate with them and counsel could not speak for their client, beyond the fact that he did not want them. Counsel had no way of knowing what the plans of the defendant were and were therefore wholly unable to state defendant's definitive choice. This choice has now been made clear. Of course, counsel at all times argued in the Pennsylvania Courts that the defendant had the right to represent himself.

It is a violation of a man's constitutional rights not to furnish him with counsel. It is the duty of the court to make an actual inquiry of his wishes and the failure of a defendant to assert his right—lest he was fully informed of it—is clearly not a waiver. The situation here is exactly like that. Here too was it the duty of the court to make direct inquiry, particularly since the court knew that counsel could not speak authoritatively for the defendant. It is important to establish the court's obligations in a situation such as this.

As the record now stands a capital case will be fought simultaneously on two fronts. One action by the defendant in his own right and another by his counsel who is being directed by the courts of Pennsylvania to continue in the representation of the defendant.

Here then we have a novel and a very serious constitutional question. Here, a man is fighting for his life. From

the reading of the petition it seems fairly clear that counsel will not be able to cooperate in strategy of this kind. On the other hand counsel—under mandate of the Supreme Court of Pennsylvania—will have to take such action as seems best to them, independent of the defendant. This then may present a very serious problem, all the more serious with a man's life at stake.

What shall counsel do? Shall counsel take such steps as in their judgment, after years of practice, are more appropriate, although such steps are contrary to the defendant's wishes and plans? Or, shall counsel defer to what seem to be the expressed wishes of the defendant and fail to take such steps which their conscience as professional men dictate?

It would seem fairly clear that this petition raises a serious and certainly a novel constitutional question, namely, the court can hold that a man may represent himself and at the same time hold that he may be tried while represented by unwanted counsel. The defendant's petition now filed and the court's proposed action now for the first time make crystal clear a situation that was a fact for years, but ignored by the courts principally because it was not and could not be made a matter of record before now.

II.

Since filing the petition for a writ of certiorari there has come to counsel's attention the recently reported case of *Reynolds v. United States of America*, 267 F. (2d) 235 (C. C. A. 9th) (1959).

> "As this Court, speaking through Judge James Alger Fee, stated in Duke v. United States, 9 Cir., 225 F. 2d 721, at page 724, certiorari denied 357 U. S. 920, 78 S. Ct. 1361, 2 L. Ed. 2d 1365: There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestionable right to defend himself. [Citing Title 28, U. S. C. A. Section 1654] Second, an

accused should never have counsel not of his choice forced upon him. [Citing Adams v. United States ex rel. McCann, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268] This Court has never failed to recognize either of these fundamental rights."

We did write a letter to the Clerk of the Supreme Court on September 23, 1959 and we do not know whether or not it is officially part of the original petition. This case (on page 236) examines the cardinal constitutional question involved apposite to our situation.

It is clear that the decision of the Supreme Court of Pennsylvania squarely contravenes the law as stated in the recent *Reynolds* case, *supra*.

By reason of the foregoing and because of the seriousness of the case and the importance of constitutional questions involved it is respectfully submitted that the writ of certiorari be granted.

EDWARD NOVAK,
Petitioner.

By His Counsel:

WALTER STEIN,
MERVYN R. TURK.

Of Counsel:

BERGER AND STEIN.

Certification.

Walter Stein, counsel for the above Appellant, hereby certifies that this Petition for a rehearing is not filed for purposes of delay but because he verily believes that the foregoing intervening and new matters are decisive and should be brought to the attention of the Supreme Court of the United States and he also certifies this petition is restricted to the grounds above specified.

WALTER STEIN.

APPENDIX.

COURT OF COMMON PLEAS,
DELAWARE COUNTY,
32ND JUDICIAL DISTRICT,
COURT HOUSE,
MEDIA, PENNSYLVANIA

COMMONWEALTH EX REL. EDWARD NOVAK, REALTOR *v.* WILLIAM J. BANMILLER, WARDEN EASTERN STATE PENITENTIARY PHILADELPHIA 30, PENNSYLVANIA	No. 1701 June Term, 1959.

PETITION FOR HABEUS CORPUS.

To the Honorables the Judges of the Said Court:

Edward Novak, the Realtor herein, this action Respectfully swears under Law and avers the following to be true.

1.

That he is a citizen of the United States.

2.

That the constitutional questions raised herein are newly discovered Legal Rights, which were unknown to him at the time of His conviction and sentence in Delaware County. The said Constitutional questions of newly discovered Legal Rights, have never been raised, nor presented to now.

3.

Warden Banmiller, the within named respondent, is illegally Detaining the Realtor against his will, in the Eastern State Penitentiary, located at 2107 Fairmount Avenue, in the city of Philadelphia Pennsylvania.

4.

That the alleged reason for the said illegal Detention, by Respondent of Realtor, is a null and void Judgment of Death which was not a Final Judgment and not in accordance to Law.

5.

Realtor was tried Convicted and Sentenced to Death upon two bills of indictments numbered 340, and 341, March Sessions 1955, Delaware County, before Hon. Arthur P. Bretherick, and a Jury in Court of Oyer and Terminer of Delaware County, Pennsylvania. Trial began January 7th and ended January 16th, 1957.

6.

Council, "Not of Realtor's choice," appealed from the Convictions and Death Sentences, without success. But never at any time raised the issues which Realtor presents herein.

7.

The new issues and Legal Rights now being raised and asserted herein by Realtor, were never presented upon Appeal, nor in any other proceeding whatever.

8.

Realtor in this instant action invokes his Constitutional Right to act as his own Counsel in this matter.

9.

Realtor respectfully contends that he now has the Lawful Right to assert herein newly discovered Legal Rights which were unknown to him at the time of his arrest—trial —Convictions and Sentences in Delaware County, Commonwealth of Pennsylvania. Also there is no time laches on Habeus Corpus. Furthermore the writ may not be summarrilly dismissed merely because a State Prosecutor files an answer denying some or all of the allegations set forth in the petition.

See—(United States Supreme Court,
No. 45 October Term 1955.
Commonwealth of Pennsylvania,
Ex-Rel. Stephen Herman, Realtor,
Vs. Dr. John Claudy, Warden,
on Writ of Certiorari,
To Pennsylvania Supreme Court,
Western District.)

10.

Allegations sworn to By a Realtor in a Petition for Habeus Corpus and not shown by the record to be false, require a Hearing in Open Court with Realtor present in person as his own witness to testify under oath. See—(Palmer v. Ashe, 324 U. S. 134. Case originated in Pennsylvania.)

ALLEGATIONS.

Realtor further swears and avers that specifically his newly discovered Constitutional Legal Rights are as follows:

A.

Realtor on February 4th. 1955, was arrested by Delaware County Police and charged shooting to death his common-law wife and her Mother Katherine and Ella K. Jones, respectfully.

Thereafter he was committed pending trial to Broadmeadows Prison, Delaware County, Pennsylvania. That subsequently in March 1955, Doctor Wilson, a State Psychiatrist employed by District Attorney Start, but paid by the commonwealth, told realtor that the District Attorney wanted Realtor examined by said Dr. Wilson, and given a spinal test together with truth serum "Sodium Penothal," which would be good for realtor. The realtor advised Dr. Wilson, in no uncertain manner that he realtor would never consent to having his spine punctured. Nor agree to injection of any truth serum. Dr. Wilson, then threatened realtor saying, that He Dr. Wilson, would forcibly take the spinal test and inject the truth serum.

The foregoing occurred in the office of the District Attorney with Dr. Wilson, Realtor and Assistant Prosecutor Paul R. Sand, Present Prosecutor Sand, told Realtor that he Mr. Sand would make sure he got things done his way as the realtor would be forced to submit. Mr. Sand, further told realtor that he the realtor, was withholding vital information which the prosecution required in order to prepare for possible unknown phases of the realtor's past life and chiefly concerning two years previously spent in a Mental Institution. The prosecutor added that he did not intend to lose the Commonwealth's case in front of a jury by any unexpected Defense Proof that realtor was in a Mental Institution.

Mr. Sand, accused realtor of concealing that he did serve two years in a Private Insane Asylum under a fictitious name or alias. Realtor denied the accusation, and said he did not know they would not leave him alone. Realtor at the time of this occurrence Did not believe Prosecutor Sand, in regarding to the reason advanced for spinal test and truth serum. But did not know what the real reason was. In any event Mr. Sand, said; "Listen Novak, I am going to give you plenty of time to agree to what I want and if you don't, we will do it by force and don't doubt it."

Thereafter in December 1956, Realtor was again brought to the District Attorney's Office, and therein was confronted with the same thing. Dr. Wilson, said: He was going to do the spinal test and inject truth serum right there in the District Attorney's Office.

Prosecutor Sand, told: realtor, his patience was exhausted, and he would give realtor one more chance to do as the Prosecutor wanted. Realtor refused to do it.

So a few days later, three Gaurds came into Realtor's cell in "Broadmeadows Prison" and beat the realtor until he was unable to get off the floor. The gaurds then tied the defenseless, and helpless realtor with cord, and kept him that way all night in the Prison Hospital. Thereon the next morning about 5:00 A. M., realtor was carried bodily outside and put-in a station wagon, and taken to Bryn Mawr Hospital, where Doctor Wilson was waiting.

Dr. Wilson ordered realtor to be held while he, the Dr. punctured realtor's spine with some kind of needle or instrument. Realtor was then strapped to a table or full length cart with wheels on it. The attendants then wheeled the realtor somewhere in the hospital into a small room. Then Dr. Wilson injected truth serum, and said; "O. K., wise guy, this sodium penothal will make you tell us everything that Mr. Sand's wants to know, whether you like it or not.

B.

During the trial of Realtor before, Judge Bretherick, and a Jury, in Delaware County, at the Court House in Media Pennsylvania, Between the 7th. and 16th of January 1957, Realtor was ordered bound and gagged right before the eyes of the jury, and was kept that way for two days. The alleged reason for Judge Bretherick, invoking the said order, was to silence the Realtor from demanding that the court to permit Defense Council to withdraw. (However, that situation is another matter and not a made issue in this writ.) But the additional reason for the said order of His Honor is raised in this action. To-wit, Realtor was

demanding that the Judge and Jury permit him to tell the Court how he was beaten by prison gaurds, and forcibly, against his own free will, made to submit to the spinal puncture, and injection of the Truth Serum.

Realtor, had he been permitted by the Court, could have shown the brutal things which he suffered. But, he was bound hand and foot with a strip of adhesive tape over his mouth. He was told that he had no Legal Right to protest, and being that he only had a sixth grade schooling, he did not know what Legal Rights were his.

However, even if he had been Clarence Darrow, He could not assert Legal or any other rights, through an adhesive tape gag which prevented him from speaking.

C.

On November 15th. 1957, The Realtor was sentenced to Death By Electrocution. Said sentence was pronounced in the court of Delaware County, by Judge Bretherick. However his Honor failed to specify or set the date of execution. Appeals have been taken and lost by the (unwanted Counsel, heretofore mentioned).. The latest follie of said unwanted counsel was to petition Commonwealth Supreme Court (May Term 1959) for a stay of a null and void Judgment of Execution, which was never Legal, from the original imposition on November 15th. 1957.

Naturally the said Supreme Court, Not having jurisdiction over such matter "Reffered" the said Counsel to the Governor.

The reason which Counsel presented the Stay of Execution for was that Counsel wanted time in which to petition the, United States Supreme Court, for Certiorari. Realtor herein after will respectfully set forth in his Legal Contentions that in this instance, the Governor of The Commonwealth of Pennsylvania, has no Constitutional, nor, Legislative Power to stay, nor to order "A Date of Execution. That is pertaining to Realtor's case, "ONLY". Such extenuating circumstances as the realtor will setforth in his case does not apply to other "Differentiated Cases."

Realtor now sets forth his Legal Contentions in their Chronological order.

CONTENTIONS

WITH REFERENCE TO ALLEGATION —A—.

Doctor Wilson, and Prosecutor Sand, were guilty of as flagrant violation of the Constitutional Rights of Realtor as could possibly be perpetrated against him.

They subjected him to star chamber methods of third degree Mental and Physical torture which were on a par with the Spanish Inquisition. The shameful climax being the beating of realtor by prison Gaurds, and forcibly being taken next morning to Bryn Mawr Hospital, where Doctor Wilson, completed the final denial of Realtor's rights, by puncturing Realtor's spine, and then giving the helpless realtor truth serum.

The information obtained in this unlawfull manner was given to Prosecutor Sand, who used it prior to Realtor's trial in order to circimvent the Defense of Realtor. However, both Prosecutor Sand, and Doctor Wilson were carefull 'during the trial' to conceal from the Jury how they defeated Realtor's cause 'Before he ever went to trial,' They used the said unlawfully obtained information for 'Pre-Trial' obtaining of evidence on which the prosecutor had a great advantage, as realtor was unaware of what he said while under the truth serum. It is of significance to here call attention to the evasive testimony of Doctor Wilson, when he was asked; "What did Realtor talk about, while under the truth serum?" Answer—"He talked and Talked." Naturally, he would not tell the jury of the evidence which realtor unwillingly gave the prosecutor, while under the truth serum drug.

Realtor contends that the foregoing unlawfill obtaiing of pre-trial evidence Done by Dr. Wilson, and the Prosecutor, was an outright Denial of the Right of Realtor to be given his Constitutional Right of Equal Protection and Due Process of Law Under the 14th. Amendment of the Constitution of the United States. It robbed Realtor of his

rights as a citizen to a fair Trial by Jury of his peers. It further constituted a violation of his rights under the 5th Amendment, Federal Constitution, which prohibits: "Any Citizen of the United States, from being forced to testify against himself." The Unlawfull evidence so obtained, was worse 'in its legal sense' than evidence secured by the Gestapo, in Nazi Germany, Under the barbaric lunatic, Hitler.

Thousands upon thousands of Americans fought and Died to preserve Democracy. Yet, Right here in these United States, we still have Hitlerite Prosecutors, and Doctors who place the conviction of Death above the Constitutional Rights of Defendants. The Supreme Court of these United States has time after time set such convictions and sentences aside with brilliant opinions and decisions, which held that it is better for a hundred men to go free, than to 'Convict One' in violation of his rights.

See: Haley v. Ohio, United States Supreme Court. "Also, Malinski v. New York, U. S. Supreme Court. Together with cases cited therein.

Realtor, respectfully contends that; Just upon these grounds alone He is legally entitled to have his conviction and sentence vacated. Otherwise of what value is the Constitution of The United States? If County Courts can ignore its fundamental safegaurds? Realtors conviction should be set aside.

WITH REFERENCE TO ALLEGATION —B—.

Judge Bretherick's order to tie and gag before the eyes of the trial Jury, constituted a Denial of the right of Realtor to employ his Constitutional Right to Free Speech in His own Defense.

His Honor, and the prosecutor prevented realtor from telling the Jury that he never voluntarily consented to the Spinal puncture, and injection of truth serum. Realtor's "unwanted counsel" would not do it. For example one of the said counsel, Mr. Stein, asked Doctor Wilson, "What realtor talked about while under the truth serum?" Doctor

Wilson replied, "He talked and talked." Mr. Stein: "But what did he talk about?" Prosecutor Sand: To Mr. Stein; "Why weren't You there to hear him Talk?" Mr. Stein promptly shut-up.

His silence was due to the fact that (Unknown to Realtor) Mr. Stein and the other unwanted Counsel, Mr. Turk, had sold the realtor out to Prosecutor Sand, by closing their eyes to realtor's rights and giving Mr. Sand permission to have realtor beaten in the jail, and forcibly takeen to the Hospital, as a guinea pig for Doctor (Jeckel Hyde) Wilson. Truth is stranger than fiction.

The United States Supreme Court has a continual steram of such cases coming before it on writs of Certiorari. The patience of the Justices on the said Court, is sorely tired by the official Lawlessness of (Conviction Happy) Prosecutors. Backed up by some (not all) County Judges. Judge Bretherick had realtor's mouth taped, to silence the voice of a fellow Human Being, who was only trying to receive a fair and impartial trial, by Jury of his peers. The spinal test puncture, and injection of truth serum, could not be effected without the voluntary consent, made in writing, by Realtor and wittnessed and Notarized. The "Unwanted Counsel" had no authority to forfit the life of Realtor.

With Rererence to Allegation —C—.

Judge Bretherick, Senteneed Realtor to Death, on the 15th Day of November 1957. His Honor, Did not set the date of Execution. Whatever reason, (if any) which His Honor may have had for not setting the date is entirely immaterial and without effect. The undeniable fact is that he did not set the date. Consequently, the incomplete sentence does not constitute a Final Legal Judgment. This is so well settled as not require any citation of authority. See: United States Supreme Court Decisions." Perhaps it may be argued that the Governor can now set the date of execution. Such argumen would be untenable, as the Gov-

ernor can only set such date, *after the date set by the original Court of Conviction has passed.*

The Governor, is the Chief Executive, and is in the Executive Branch of Government. He is not, (and cannot) be in the judicial branch. He is not a Judge in the Commonwealth. He cannot infringe upon the Judiciary. The Commonwealth Constitution prohibits it. The Governor of Pennsylvania could no more sit as a Judge in a criminal matter than, President Eisenhower, could sit as a Judge in a Federal Court.

Neither Governor, nor President, has any Judicial power to take place of the sentencing Judge, in the original County, and Court of Conviction and Jurisdiction, and Cannot Complete the Unfinished Judgment in Realtor's case upon the mere assumption, that the Governor can create a final Judgment of Death, by merely saying that (regardless of the law), he fixes the date of Realtor's execution, even though, the original sentencing Judge failed to set a Date at the time of sentence.

Realtor's case is distinguished from others, in that, A sentencing Judge, Did set a date of execution, and that date passed due to appeals, etc. etc. Then of Course the Governor can name the subsequent date of execution. But whereas, the Judge in the Realtor's case, *did not fix a date of execution*, The Governor, himself, is Powerless to fix (original date) as the constitution does not permit anyone, except the sentencing Judge, in the court of conviction to set the original Date of Execution.

Perhaps past Governors, have unknowingly, and unintentionally, but erroneously, done this very thing. However, Realtor is of the respectful belief that our present Governor, The Honorable: David L. Lawrence, will not make such a blunder. But instead order realtor's case right back where it belongs in the original Delaware County Court, for proper Adjudication of this matter by a Judge of that Court. See: United States v. Henderson.

The Conviction and sentence of realtor should be set aside as a Nullity at Law, and a new Trial ordered. This

would be in the interests of Justice, to both the Realtor, and to the Commonwealth.

The Due Process of Law Clause in the 14th Amendment, Federal Constitution, and the Constitution of the Commonwealth, provides the remedy of a new trial, for the righting of the wrongs, which the ralтor has suffered.

CONCLUSION.

Realtor, upon the grounds set forth, Requests the Court to please grant him a hearing in person, in open Court, and to testify as his own witness to the within matters. And to produce witnesses whose testimony can establish the truth in the allegations. And to act as his own counsel.

He Respectfully contends: He is legally entitled to a hearing to prove, his allegations.

See: (Commonwealth Ex Rel. Herman
v. Doctor Claudy, Warden.
United States Supreme Court
No. 45, October Term, 1955.)

RESPECTFULLY SUBMITTED BY
EDWARD NOVAK, (S-008)
EASTERN STATE PENITENTIARY, PHILADELPHIA PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

Edward Novak, deposes and says under oath, that, the entire foregoing is true to his best knowledge, and belief.

EDWARD NOVAK,
Realtor.

Sworn and subscribed to before me this 26th day of May 1959.

EDWARD A. RIEFUS
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires May 20, 1961